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Transparency in International Commercial Arbitration

Catherine A. Rogers*

I. INTRODUCTION

Commentators and scholars have long been making the case for expanding transparency in the international commercial arbitration system.¹ Recently, however, these proposals have taken on a greater sense of urgency and an apparent determination to impose transparency reforms on unwilling parties.² Perhaps incited by the procedural deficiencies in other international tribunals or by the difficulties in regulating multinational companies in a globalized world, these new transparency advocates exhort the general public's stakehold in many issues being adjudicated in international commercial arbitration. This stakehold, they argue, necessitates greater transparency through, among other things, compulsory publication of international commercial arbitration awards. While these public interests are undeniably present

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1. Some of the earliest and most thorough works in this area are Julian D. M. Lew, *The Case for the Publication of Arbitration Awards*, in *THE ART OF ARBITRATION* 22 (Jan C. Schultz & Jan van den Berg eds., 1982) and Thomas E. Carbonneau, *Rendering Arbitral Awards with Reasons: The Elaboration of a Common Law of International Transactions*, 23 COLUM. J. TRANSNAT'L L. 579, 606 (1985). My principal concern in this Article is transparency in international commercial arbitration, by which I mean "nonspecialized arbitration between private parties involved in international commercial transactions." Christopher R. Drahozal, *Contracting Out of National Law: An Empirical Look at the New Law Merchant*, 80 NOTRE DAME L. REV. 523, 530 (2005).

2. For example, some scholars have proposed compelling publication of awards over party objection. Cindy G. Buys, *The Tensions Between Confidentiality and Transparency in International Arbitration*, 14 AM. REV. INT'L ARB. 121, 138 (2003) (arguing for a presumption in favor of publication that can only be overcome by objection by both parties); Dora Marta Gruner, *Accounting for the Public Interest in International Arbitration: The Need for Procedural and Structural Reform*, 41 COLUM. J. TRANSNAT'L L. 923, 960-63 (2003) (proposing establishment of an official international regulatory body to require and oversee award publication except in those cases involving exclusively "issues of a private, consensual nature").

and worthy of serious attention, the solutions these scholars propose seem to raise more questions than they answer.

As an initial query, if the public has such important interests at stake, why stop at requiring award publication? Why not insist on a full right for the public to attend hearings and access documents filed in arbitrations, as has been urged or implemented in other international tribunals?³ These and other questions cannot be answered if we have no meaningful measure—either in terms of frequency or relative importance—of the public interests that are actually implicated in international commercial arbitration,⁴ and no basis for estimating how effective proposed reforms would be at promoting those interests. Given the likelihood of resistance to mandated transparency reforms, it will be necessary to build into the system structural mechanisms to ensure compliance. Such enforcement mechanisms will necessarily impose added costs on parties and on the system, but without a meaningful assessment of the potential gains, how can we justify and allocate the costs of obligatory transparency reforms? This Article attempts to answer some of these questions by exploring the normative and instrumentalist assumptions underlying the transparency debate, as well as the practical causes of, and prospects for, transparency in international commercial arbitration.

In Part II of this Article I explore the conceptual meaning of the term “transparency,” as distinguished from similar terms with which it is often confused, “public access” and “disclosure.” Based on this definition, it is possible to differentiate transparency concerns in international commercial arbitration from those of its cousin (and sometimes supposed twin), investor-state arbitration, as well as from other public international tribunals, national courts, and conventional domestic arbitration. These definitions also provide a framework for discerning the distinct purposes, means, and consequences of various potential reforms.

Part III assesses the strides toward transparency that the international commercial arbitration system has made in recent years. While the

3. See, e.g., Julio A. Lacarte, *Transparency, Public Debate and Participation by NGOs in the WTO: A WTO Perspective*, 7 J. INT'L ECON. L. 683, 686 (2004) (describing the evolution in WTO activities from a culture of secrecy to growing acceptance of the need for transparency to improve public understanding of the WTO); David A. Gantz, *The Evolution of FTA Investment Provisions: From NAFTA to the United States-Chile Free Trade Agreement*, 19 AM. U. INT'L L. REV. 679, 747 (2004) (noting that “Congress directed the President to ‘ensur[e] that all requests for dispute settlement are promptly made public’ along with submissions, findings, and decisions; to ensure that ‘all hearings are open to the public;’ and to establish a ‘mechanism for acceptance of amicus curiae submissions from businesses, unions and non-governmental organizations’”). As of 2004, one NAFTA proceeding has been opened to the public by televising the hearings. *Id.* at 750.

4. For a more detailed discussion of costs that would be imposed, see *infra* notes 107–09 and accompanying text.

primary purpose of most of these reforms has been to make the system more reliable and predictable for its direct users, the increased transparency also has made the system less enigmatic to the general public. Precisely because arbitration participants are the primary constituency, however, the reforms have been principally the product of competitive pressures and cooperative efforts between and among its participants. This pattern of reform from within stands in stark contrast with the experiences in domestic arbitration and international investment arbitration, where public outcry and governmental intervention have compelled transparency reforms.⁵

In Part IV I turn back to the new calls for mandatory transparency reforms to assess them in light of the conceptual framework provided in Part II and the current practices assessed in Part III. I argue that forcibly imposed transparency reforms would have to be imposed at the international level, and would ultimately require a fundamental reordering of the system. Given the obstacles presented by regulation of that nature, I argue that focusing on the substantive information sought, as opposed to the procedures through which it is developed, is a better target for reform efforts. Nationally imposed disclosure obligations can avoid most of the potential problems raised by the proposed system-wide transparency reforms. Meanwhile, internally driven, incremental movement toward greater transparency will continue to gain support as parties realize the benefits of greater control and increased predictability.

II. DEFINING THE TERMS

Debate over transparency in international arbitration tends to blur together three distinct but related concepts: public access, transparency, and disclosure. The three are conflated because commonly transparency is defined simply as a synonym for “accountability” or “openness.”⁶ At this level of generality, public access, transparency, and disclosure appear synonymous. But while they serve effectively similar purposes, more precise definitions reveal that they are not coterminous. Each principle implies its own potential means, benefits, and consequences. Delineating the boundaries of these three concepts, as well as their points of overlap, is a necessary predicate to evaluating the state of transparency

5. See *infra* notes 89–91 and accompanying text (describing the arbitration reforms that occurred in California).

6. Dictionary definitions often equate the two. For example, the definition of “transparency” in the online encyclopedia Wikipedia is “as used in the humanities, implies openness, communication, and accountability.” [http://en.wikipedia.org/wiki/Transparency_\(humanities\)](http://en.wikipedia.org/wiki/Transparency_(humanities)).

in international commercial arbitration today and the options for future development improvements.

A. Public Access

Public access to adjudicatory proceedings refers to an individual citizen's right to attend or access proceedings.⁷ The right originated before the Norman conquest of England,⁸ and in the modern U.S. system, it is constitutionally protected by the First Amendment.⁹ This right is particularly important for common law systems, in which judges are expressly charged with law-making powers,¹⁰ and as a result common law systems are relatively unique in the strength of their commitment to guaranteeing the right of public access.¹¹ While framed as an individual right, its purpose is to facilitate public monitoring of judicial officers, to check against potential abuses of power, and consequently to contribute to overall judicial quality.¹²

7. In discussing public access, I am referring to third-party public access and not to the rights of aggrieved parties to bring their own claims to a court, or to opportunities to intervene as parties or amici when their interests are more directly implicated by a lawsuit. See *infra* notes 105–20 and accompanying text.

8. See Paul Marcus & Vicki Waye, *Australia and the United States: Two Common Criminal Justice Systems Uncommonly at Odds*, 12 TUL. J. INT'L & COMP. L. 27, 79 (2004) (tracing open trials to the English system); see also *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8 (1986) (noting that the history of public access to trials predated the Norman conquest of England).

9. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (holding that “the right to attend criminal trials is implicit in the guarantees of the First Amendment”). Several cases that came after *Richmond Newspapers* confirmed that this right extends to accessing other aspects of the adjudicatory process. See *Press-Enter. Co. v. Superior Court*, 464 U.S. 501 (1984) (*voir dire*); *Press-Enter. Co. v. Superior Court*, 478 U.S. 1 (1986) (preliminary hearings); see also Judith Resnik, *Competing and Complementary Rule Systems: Civil Procedure and ADR: Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 656–57 (2005) (the Constitution “secures access to at least court-based hearings”). Although the Supreme Court has not taken up the issue, several circuit courts have found that the First Amendment right also applies to civil proceedings and files. See, e.g., *Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16, 23 (2d Cir. 1984) (concluding that “the First Amendment does secure to the public and to the press a right of access to civil proceedings”).

10. *Press-Enter.*, 464 U.S. at 508. In countries where case law is a formal source of law, publication of judgments also informs the citizenry how to adjust their behavior to comport with the law.

11. For example, as Mitchel Lasser explains, a critical “discursive sphere” exists “[i]nside the protective walls of the Cour de cassation [the French equivalent of the U.S. Supreme Court]” that is “sheltered from the general public.” Mitchel De S.-O.-l’E. Lasser, *The European Pasteurization of French Law*, 90 CORNELL L. REV. 995, 1005 (2005). In this realm, much of the deliberative proceedings critical to the final judicial decision generally are not published in the final written decision, and some aspects—such as the rapporteur’s report—are maintained as secret, even though they are read aloud. See *id.* at 1005–06 (analytic and argumentative sections of report are unavailable to public); see also Inga Markovits, *Selective Memory: How the Law Affects What We Remember and Forget About the Past—The Case of East Germany*, 35 LAW & SOC’Y REV. 513, 525 (2001) (noting that “in Germany, court files, though public records, are in any case not publicly accessible”).

12. This purpose guides courts in interpreting the extent and limits of the right. Peter A. Winn,

Public access is often discussed as part and parcel to transparency,¹³ but the distinction between them has never been clearly analyzed. Distinguishing them is important for understanding why there is clamor for increased transparency in international commercial arbitration, but no challenge to prevailing arbitral rules that expressly provide for closed, private hearings and case files.¹⁴ Why is transparency so important, but its apparent counterpart, public access, implicitly expendable in the international commercial arbitration context?¹⁵ The short answer, which will be elaborated below in Section II.B., is that public access is linked to

Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information, 79 WASH. L. REV. 307, 308–11 (2004) (noting that courts are willing to ensure public access when the purpose is to provide oversight of the judicial process, but more reluctant when it is for other, particularly commercial, purposes). Public access is distinguishable from other types of access rights that seem to bear a resemblance, such as the right of participation that related third parties have or that victims have in some civil law systems and the International Criminal Court. K. Lee Boyd, *Universal Jurisdiction and Structural Reasonableness*, 40 TEX. INT'L L.J. 1, 44 (2004) (“In civil law countries such as France, the concept of the plaintiff-prosecutor allows victims to actively participate in a criminal prosecution by the state for retribution purposes.”); William T. Pizzi & Mariangela Montagna, *The Battle to Establish an Adversarial Trial System in Italy*, 25 MICH. J. INT’L L. 429, 432–33 (2004) (noting that some countries allow crime victims to participate at the trial against the defendant and may provide a court appointed attorney to the victim or allow pursuit of civil damages); see also Boyd, *supra*, at 44 (“Many multinational instruments provide for the right to reparations, including the statute of the International Criminal Court, which contemplates the establishment of a trust fund to pay restitution to the victims of crimes.”). While there is arguably some overlap, a discussion of the right of intervention is beyond the scope of this Article. For a thorough discussion of the procedural, equitable, public policy, and contractual issues raised by third-party intervention in international arbitration, see generally S. I. Strong, *Intervention and Joinder as of Right in International Arbitration: Infringement of Individual Contract Rights or a Proper Equitable Measure?*, 31 VAND. J. TRANSNAT’L L. 915, 932 (1998).

13. See, e.g., David Mechanic, *The Media, Public Perceptions & Health, and Health Policy*, 5 HOUS. J. HEALTH L. & POL’Y 187, 206 (referring to “transparency and public access” as “one value” that enhances opportunities for choice in democratic institutions); Richard B. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?*, 68 LAW & CONTEMP. PROBS. 63, 73 (2005) (describing decisional transparency as including public access to government records); Steve Charnovitz, *Transparency and Participation in the World Trade Organization*, 56 RUTGERS L. REV. 927, 942 (2004) (noting that the U.S. House of Representatives set a U.S. “transparency” objective for WTO negotiations that calls for “public access for appropriate meetings, proceedings, and submissions” to and at the WTO”); Ernst-Ulrich Petersmann, *Challenges to the Legitimacy and Efficiency of the World Trading System: Democratic Governance and Competition Culture in the WTO*, 7 J. INT’L ECON. L. 585, 592–93 (2004) (arguing that public access to WTO meetings would not prevent legitimate confidentiality but transparency “could improve the public image and ‘grass root perception’ of the formerly too secretive . . . GATT”).

14. See ICC RULES OF ARBITRATION, Art. 21.3 (1998) (“Save with the approval of the Arbitral Tribunal and the parties, persons not involved in the proceedings shall not be admitted.”); UNCITRAL ARBITRATION RULE 25.4 (“Hearings shall be held *in camera* unless the parties agree otherwise.”). Even more public-oriented international arbitration rules, such as those held by the International Center for Settlement of Investment Disputes, include similar, though contested, provisions. ICSID Arbitration Rule 32(2) (providing for hearings that are closed to the public unless agreed otherwise by the Tribunal and the parties).

15. Notably, this is a significant departure from investor arbitration, where the calls for transparency are much more boisterous and related calls for public access are almost ubiquitous. See, e.g., Fulvio Fracassi, *Confidentiality and NAFTA Chapter 11 Arbitrations*, 2 CHI. J. INT’L L. 213, 217 (2001) (discussing public access when nations are parties to arbitrations).

the notion of a political community. This implication is founded in its structure as an individual right, which presumes enforceability as against a political structure.¹⁶ What sense would it make, for example, to insist that a Brazilian citizen has a “right” to attend a hearing in Austria for a case between a Chinese and Russian party that is governed by German law? It is unclear under prevailing theories why such a right should exist or against whom it could be asserted. Public access is a mechanism for promoting transparency, but it is not a necessary feature of transparency.

B. Transparency

Transparency is considered an important virtue for any decision-making body and is insisted on in a range of contexts.¹⁷ In this Article, I limit my discussion of transparency to the adjudicatory context, defining it to mean the ready availability to “interested parties” of the rules that regulate an adjudicatory decision-making process. Like public access, the general aim of transparency is to facilitate monitoring the adjudicator.¹⁸

Within the U.S. legal system, the two concepts of public access and transparency largely merge. Both are satisfied by the public’s ability to attend proceedings, as well as the public availability of the rules governing the process, the files compiled during the process,¹⁹ and the scrupulously detailed judicial opinions explaining the reasons underlying the outcome.²⁰ Even if there appears to be significant overlap, several

16. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 93 (1977) (differentiating concrete or genuine rights from general political aims that are not subject to judicial enforcement).

17. See William B.T. Mock, *Corporate Transparency and Human Rights*, 8 *TULSA J. COMP. & INT’L L.* 15, 16 (2000) (“Transparency is a term much bandied about in organizational and governmental studies these days.”). One leader in promoting transparency in governmental settings more generally is an organization called “Transparency International,” which is present through national chapters in various countries and “work[s] to increase levels of accountability and transparency [in their respective countries], monitoring the performance of key institutions and pressing for necessary reforms in a non-partisan manner.” Transparency International, http://www.transparency.org/about_us/approach (last visited Dec. 28, 2005).

18. In a related vein, Mark Fenster explains in his thoughtful work on transparency in executive branch contexts that transparency “enables free flow of information among public agencies and private individuals, allowing input, review, and criticism of government action, and thereby increases the quality of governance.” Mark Fenster, *The Opacity of Transparency*, Mar. 15, 2005, at 13, <http://ssrn.com/abstract=686998>.

19. See *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988) (finding a First Amendment right of public access to summary judgment filings).

20. As Mitchel Lasser explains:

American judicial argumentation represents the pledge, the proof, and the crucible of American judicial justice. Thus, it should come as no surprise that the American system demands that its judges take signed, individual, and public responsibility for their arguments and imposes a rule-of-law-based transparency requirement that these arguments be made immediately accessible to the public.

features distinguish the concept of public access from the concept of transparency.

Most fundamentally, whereas public access is constructed as an individual right, transparency is a condition of the system. Several commentators have argued there is an emerging international norm of transparency,²¹ and this emerging norm has enjoyed particular vigor in international adjudication contexts. All new international criminal tribunals explicitly recognize that transparency is an essential precondition of their legitimacy because it provides an opportunity for critique of their processes.²² Given the extended incubation that international norms require to mature into full-fledged international rights, it may still be a while before there is a recognized “right” of public access redeemable by individuals. In the meantime, however, gratuitous public access is operating as a means by which many international tribunals seek to assure transparency.²³

While transparency may be more widely recognized at the international level than public access, it is also narrower in scope. Transparency refers to information about a decisional process provided to interested parties, whereas public access, as its name suggests, is a right of all citizens. In the context of a delimited political community, such as the U.S. legal system, public access and transparency become largely coterminous because the “interested party” is the “public.” With international tribunals that deal with inherently public law matters, there can also be significant if not complete overlap between the public on the

Lasser, *supra* note 11, at 1003.

21. These observations generally rely on much looser definitions of transparency, which extend beyond the dispute resolution context. For example, Steve Charnovitz argues that the “foundation stone” of an international transparency norm is the 1923 International Convention Relating to the Simplification of Customs Formalities, which required that customs be promptly published “in such a manner as to enable persons concerned to become acquainted with them and to avoid the prejudice which might result from the application of customs formalities of which they are ignorant.” Steve Charnovitz, *Transparency and Participation in the World Trade Organization*, 56 RUTGERS L. REV. 927, 929 (2004) (quoting International Convention Relating to the Simplification of Customs Formalities, Nov. 3, 1923, 19 AM. J. INT’L L. SUPP. 146, art. 4 (1925)). Charnovitz constructs his transparency norm to refer not only to the Convention’s main purpose of providing notice to affected parties, but also to the inclusive negotiation process and apparently reliable enforcement mechanism that the Convention employed. *Id.* at 929–31. Recently, the Inter-American Court of Human Rights held that article 13 of the Inter-American Convention on Human Rights “protects the right of every person to solicit access to information under the control of the State” and imposes a “positive obligation of the State to provide it.” *Claude Reyes y otros vs. Chile*, Sentencia de 19 de septiembre de 2006. Serie C No. 151, para. 77 (translation by Vicens Feliu).

22. For example, the Iraqi Special Tribunal Web site describes itself as striving “towards an Iraqi judicial establishment characterized by its neutrality, integrity and transparency.” Iraqi Special Tribunal, <http://www.iraqspecialtribunal.org/en/about/overview.htm>.

23. Carl Baudenbacher, *Forward: Globalization and the Judiciary*, 40 TEX. INT’L L.J. 353 (2005) (“NAFTA is also providing for greater public access as well as public participation . . .”).

one hand and interested parties on the other.²⁴ This overlap is why international criminal tribunals commit not only to transparency, but also to public access.²⁵ It is also why the right of public access seems self-evident in the context of WTO proceedings and investor-state arbitration, where transparency is important to the institutions' perceived legitimacy.²⁶

In contrast to investment arbitration and WTO adjudication, the international commercial arbitration system primarily adjudicates private law claims between private parties in a system that is divorced from any single national political context²⁷ and stands independent of established international governance institutions. At present, even cosmopolitan international legal theorists would have difficulty effectively arguing that the world's citizens are interested parties in all of its proceedings.²⁸ Not

24. For example, the International Criminal Tribunal for the former Yugoslavia (ICTY) Rules of Procedure and Evidence provide that "[a]ll proceedings before a Trial Chamber, other than deliberations of the Chamber, shall be held in public, unless otherwise provided." ICTY, R. P. & EVID. 78, U.N. Doc. IT/32/Rev.36, available at <http://www.un.org/icty/legaldoc-e/index.htm>.

25. In the investment treaty context, the state is the architect, patron and target of the arbitration. The citizens of those states involved have an interest in monitoring how their respective states conduct themselves in such proceedings. More generally, investment arbitration tribunals are making decisions that can require payment from public coffers and effect significant changes in states' social and economic policy. See Cindy G. Buys, *The Tensions Between Confidentiality and Transparency in International Arbitration*, 14 AM. REV. INT'L ARB. 121, 134 (2003) (noting that investor-state arbitral awards "may require a change in the law and practice of the State party and because the public will likely pay for any liability imposed on a State as a result of the award through tax revenues"). In response to such concerns, the ICSID Administrative Council recently adopted amendments to ensure greater transparency in the legal analysis contained in ICSID awards and participation by amicus submissions. An earlier version of the proposed amendments is available at <http://www.worldbank.org/icsid/highlights/052405-sgmanual.pdf>, and thanks is due to Barton Legum for highlighting this development. The opening up of investment arbitration contrasts with the foot-dragging response to similar proposed reforms at the WTO. See Steve Charnovitz, *Transparency and Participation in the World Trade Organization*, 56 RUTGERS L. REV. 927, 939 (2004) (noting that at the WTO, "all oral hearings of WTO panels and the Appellate Body are closed to the public").

26. See, e.g., Carlos G. Garcia, *All the Other Little Dirty Secrets: Investment Treaties, Latin America, and the Necessary Evil of Investor-State Arbitration*, 16 FLA. J. INT'L L. 301, 324 (2004) ("A lack of transparency leads to 'a legal morass that complicates court proceedings . . . [lending to the] random and arbitrary nature of court decisions.'" (quoting Rudolf Hommes, *Institutional Reliability and Development*, in JUSTICE DELAYED: JUDICIAL REFORM IN LATIN AMERICA 48 (E. Jarquin & F. Carrillo eds., 1998))); Fulvio Fracassi, *Confidentiality and NAFTA Chapter 11 Arbitrations*, 2 CHI. J. INT'L L. 213, 221 (2001) ("Arbitrations that have broad and far-reaching public policy implications tend to draw attention from media and nongovernmental organizations. Maintaining a shroud of confidentiality over proceedings and documentation simply draws intense criticism and does harm to the legitimacy of the process.").

27. The system was specifically designed to minimize the role of national courts. See W. MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION: BREAKDOWN AND REPAIR 113 (1992) (noting that the international arbitration system intentionally minimizes the role of national courts "will transfer the real decision power from the arbitration tribunal . . . to a national court").

28. If, as some have suggested, the international commercial arbitration system morphs into a single international tribunal, the nature of the public's interest in its processes may well be quite

surprisingly, therefore ardent advocates of compulsory transparency reforms have conceded that transparency should not be insisted on in all cases because the public does not have an interest in all cases.²⁹ This concession, however, raises a range of problematic questions about by whom, when, and how determinations about the public interest should be made.³⁰ It also confirms that in some subset of cases, the concept of interested parties is distinguishable from the concept of the public.

When the concept of interested parties is separated from the public, it becomes clear that the international commercial arbitration system has made significant, even revolutionary advances toward greater transparency in recent years. Transparency gains in international arbitration have been under-appreciated, however, because its beneficiaries (the systems' users) are regarded as the principal obstacle against transparency for the benefit of the general public. As I explain in more detail below, however, the systems' users have driven reform efforts from within, but the public has benefited vicariously from these self-interested transparency gains. Mostly, however, I argue that to date public interests have been addressed, and should be addressed, principally through disclosure obligations that are collateral to, not part of, arbitration proceedings.

C. Disclosure

Public access and transparency seek to ensure scrutiny and evaluation of decision-making processes, consequently promoting their legitimacy. As such, they are principally means by which to control or alter decision makers' behavior. Disclosure obligations, by contrast, are principally directed at substantive information and are designed to

different. See generally Hans Smit, *The Future of International Commercial Arbitration: A Single Transnational Arbitral Institution?*, 25 COLUM. J. TRANSNAT'L L. 9 (1986) (discussing the advantages of an institutional arbitration system); Mark Gibney, *On the Need for an International Civil Court*, 26 FLETCHER F. WORLD AFF. 47, 55 (2002) (proposing an international civil court to hear human rights claims). Here, I distinguish the notion of a public interest in arbitral adjudicatory processes generally from the very real potential that there may be a general public interest in the substance of a particular case.

29. See Dora Marta Gruner, Note, *Accounting for the Public Interest in International Arbitration: The Need for Procedural and Structural Reform*, 41 COLUM. J. TRANSNAT'L L. 923, 960 (2003) (limiting her proposals to exclude cases involving exclusively "issues of a private, consensual nature").

30. Arguably, any decision finding no public interest should be "transparent" since one purpose of transparency would be to facilitate debate and contests about when and to what extent such interests exist. A transparent decision that a particular case did not involve a public interest would, however, presumably require revelation of much of the information the decision concludes can be legitimately maintained as confidential.

benefit those receiving the relevant information.³¹ Disclosed information may incidentally constrain the entities making disclosures, but its primary purpose is to enable recipients of the information to make strategic choices.

Whereas transparency is said to enhance the potential for monitoring decision makers generally, disclosure obligations are imposed to satisfy specific regulatory purposes, such as maintaining healthy capital markets,³² easing strains on shifting labor markets,³³ protecting the public against health and safety threats, and informing consumers about products they purchase.³⁴ These disclosure obligations are distinguishable from transparency. Disclosure obligations focus on substantive information, whereas transparency rules focus on how that information is handled by a particular institution. Disclosure obligations target specific information for defined regulatory purposes, whereas transparency rules apply across the board to the activities of an institution, without regard to the nature of the information involved.

Even if the two can be teased apart, they can also operate in tandem. Mandatory disclosure obligations can promote transparency when the availability of specific categories of information allows monitoring of decision making. A classic example, outside the dispute resolution context, is the requirement that publicly traded companies disclose material financial information. At the most basic level, this disclosure allows investors to determine whether companies are profitable. But this information also renders the internal decision making of the corporation more transparent, allowing investors to evaluate whether the company is being soundly managed, and hence whether it is likely to remain profitable.³⁵

31. See David Weil, *The Benefits and Costs of Transparency: A Model of Disclosure-Based Regulation*, (2002), <http://ssrn.com/abstract=316145>. Weil actually defines disclosure-based regulation as a form of transparency, but he is discussing the concepts outside the adjudicatory context, where such distinctions are less relevant.

32. When a company is listed on a public stock exchange, national financial regulations require the company to disclose material information that may affect the price of its stock. See Robert G. Vaughn, *America's First Comprehensive Statute Protecting Corporate Whistleblowers*, 57 ADMIN. L. REV. 1, 31–46 (2005) (discussing the circumstances under which such disclosures are required).

33. The Worker Adjustment and Retraining Notification Act (WARN), which requires employers to disclose to employees and local communities plans to cease operations, can be understood as promoting stability in the labor market by helping workers to plan in advance for large-scale job loss. Weil, *supra* note 31.

34. See, e.g., 15 U.S.C. § 2302 (requiring full and conspicuous disclosure of warranties provided on consumer products).

35. It is not necessarily the case that the entity making the disclosure is the same one whose decision making is rendered more transparent by the disclosure. In another example, again outside the dispute resolution context, there are proposals to require that companies disclose revenues received and paid to governments on a country-by-country basis. The purpose of this initiative, which has received broad support from a range of NGOs, is to allow various groups to monitor how

In another example closer to home, arbitrator candidates are required by all arbitral rules and judicially interpreted enforcement standards to disclose a range of information about their experience and potential conflicts. This information helps in determining whether particular arbitrators are subject to unacceptable conflicts, but in the event that they are appointed, it also renders their decision making more transparent by revealing relationships and experiences that may influence their analysis.³⁶

In contrast to litigation or domestic arbitration, conventional international commercial arbitration implicates far fewer issues that are targeted by governmentally imposed disclosure obligations. At least to date, consumers are not parties,³⁷ health and safety issues rarely arise,³⁸ and employment claims are relatively rare and generally involve high-level, well-represented executives.³⁹ By and large, the parties to an

much money is being received by various governments as a first step to pressuring responsible spending decisions. Press Release, Global Witness, Reform of International Accounting Standards for Oil, Gas and Mining offers Opportunity for Greater Transparency (Sept. 19, 2005) available at http://globalwitness.org/press_releases/display2.php?id=308; see also Naomi Cahn, *Corporate Governance Divergence and Sub-Saharan Africa: Lessons from Out Here in the Fields*, 33 STETSON L. REV. 893, 917–18 (2004) (discussing proposals and their contributions to transparency and anti-corruption efforts).

36. See *infra* notes 87–99 and accompanying text.

37. William W. Park, *Duty and Discretion in International Arbitration*, 93 AM. J. INT'L L. 805, 820 (1999) (suggesting statutory innovations that remove consumer and employment claims from the ambit of international arbitration); Donna M. Bates, Note, *A Consumer's Dream or Pandora's Box: Is Arbitration a Viable Option for Cross-Border Consumer Disputes?*, 27 FORDHAM INT'L L.J. 823, 867–68 (2004) (arguing that “the lack of separate consumer protocols in international arbitration providers’ rules” make it ill-suited to consumer claims).

38. Confidential settlement agreements in litigation contexts have, at least temporarily, shrouded a disturbing array of hazards, from Bridgestone/Firestone tire defects to the Catholic Church’s sexual abuse scandals. In reaction to these and other highly publicized efforts to hide threats to public health and safety, various state legislatures have passed a range of “sunshine” laws designed to reduce or prohibit altogether “secret” settlements in lawsuits. Alison Lothes, *Quality, Not Quantity: An Analysis of Confidential Settlements and Litigants’ Economic Incentives*, 154 U. PA. L. REV. 433, 433 (2005).

39. Many countries expressly preclude employment claims from being arbitrated, even if the employee at issue is a well-heeled executive. The reduction of trade barriers, which often include services, is leading to a more mobile workforce such that international employment claims may not be such an eccentricity in the future. A disturbing sign of the potential hazards of opening international commercial arbitration to imbalanced employment disputes is in the area of seamen’s claims, where the New York Convention has been used to essentially gut the Fair Labor Standards Act and other employment claims asserted by seamen. See David W. Robertson, *Recent Developments in Admiralty and Maritime Law*, 29 TUL. MAR. L.J. 369, 428–29 (2005) (discussing a series of judicial opinions that hold that the FAA’s express exclusion of “contracts of employment of seamen” is inapplicable in cases governed by the New York Convention). For all the criticisms that can rightly be lodged against these conclusions as a matter of statutory interpretation, and as a matter of policy, applying the New York Convention to seamen’s claims seems perilous and inconsistent with the original business-to-business model under which international commercial arbitration was conceived. Cf. Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 1015–24 (1999) (making a similar argument that in the domestic context “[c]urrent uses of arbitration . . . are a far cry from the craft guild model” for

international commercial arbitration are two relatively well-matched international corporate entities involved in a commercial dispute. As a result, the only category of disclosure obligations that routinely apply to international arbitration proceedings are those pertaining to financial disclosure of legal proceedings, including private proceedings, that may affect the company's stock price.⁴⁰

Even if these financial disclosures can capture more than is generally presumed, they will not capture all the public interests that are implicated in international commercial arbitration. As Roger Alford has pointed out, international arbitration has the potential to become an important forum for adjudicating claims involving allegations of human rights abuses.⁴¹ As I argue in more detail below, voluntary disclosure and existing disclosure requirements probably already provide disclosures about a significant percentage of cases implicating these interests, and expanding disclosure obligations to cover other categories may be the best way to address the public's interests in other cases.

III. TILTING TOWARD TRANSPARENCY⁴²

Arbitral decision making of yesteryear occurred in a virtual black box. Determined to avoid the courts of their adversaries and anxious to resume their business dealings, parties discreetly submitted their disputes to the fair-minded judgment of arbitrators. At that time, international commercial arbitration was predominantly a compromise-oriented process in which "strictly legal considerations [could be] pushed aside for the sake of achieving unanimity among the arbitrators and giving something to both parties."⁴³ Instead of formal, transparent rules, arbitrators crafted proceedings based on their culturally defined professional experiences and they ruled based on their expert, but effectively covert, sense of what was equitable and just. As a consequence of these conditions, parties had little ability to peek at the inner workings of the decisional machine. Even if they could, the number of skilled arbitrators and recognized institutions were few, so

which arbitration and FAA standards were originally conceived).

40. See Vaughn, *supra* note 32, at 37–38 (describing what companies must disclose).

41. See Roger P. Alford, *Arbitrating Human Rights*, AM. SOC'Y INT'L L. PROC. 233, 235 (2005) (arguing that international arbitration may provide the most promising mechanism for holding sovereign entities accountable for human rights violations).

42. "Tilting toward transparency" is Scott Donahey's phrase. *Model Conduct Rules Can Guide ADR Into Contracts*, ALTERNATIVES TO HIGH COST LITIG. (CPR Instit. For Dispute Resolution, New York, N.Y.), Mar. 2005 at 51, 54.

43. F. A. Mann, *The Aminoil Arbitration*, 54 BRIT. Y.B. INT'L L. 213, 214 (1983).

there was no basis for comparison shopping.⁴⁴ High rates of voluntary compliance also ensured that national courts would not be able to glimpse inside the system during enforcement proceedings.⁴⁵

Today the situation is quite different. A series of reforms have made international commercial arbitration considerably more transparent, meaning that the rules that regulate decision making are more readily available to interested parties, who in this instance are the users of the system. At the same time, a growing number of voluntary and involuntary disclosures provide increased information to the users, as well as to the general public, about numerous individual cases. While the disclosures generally are made for reasons other than to advance transparency, the information they provide inevitably illuminates the inner workings of the international commercial arbitration system. This Part examines those changes. In Section A I describe the combination of competitive and cooperative forces that have produced the increased transparency by clarifying procedural rules and increasing the frequency with which final awards are published. In Section B I describe research initiatives that have extended these transparency gains.

A. Competition and Cooperation

A dramatic increase in trade and trade-related disputes has increased the number and diversity of participants in the international commercial arbitration system.⁴⁶ The result has been increased competition among institutions,⁴⁷ arbitrators, and parties, but also cooperative efforts to

44. As Dezalay and Garth have explained, "competition for arbitration business favored a few institutions and settings. The International Chamber of Commerce was clearly the leading, even dominant, institution . . . [T]he same, relatively few, names of arbitrators were repeated over and over on both sides of the Atlantic." YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* 9 (1996).

45. See Thomas E. Carbonneau, *Rendering Arbitral Awards with Reasons: The Elaboration of a Common Law of International Transactions*, 23 COLUM. J. TRANSNAT'L L. 579, 606 (1985); see also Delissa A. Ridgway, *International Arbitration: The Next Growth Industry*, DISP. RESOL. J., Feb. 1999, at 50.

46. See, e.g., Elena V. Helmer, *International Commercial Arbitration: Americanized, "Civilized," or Harmonized?*, 19 OHIO ST. J. ON DISP. RESOL. 35, 38 (2003) (citing various statistics, including those indicating that "two-thirds of all cases brought to ICC arbitration arose in the last 20 years of its 75-year existence" (quoting W. LAURENCE CRAIG ET AL., *INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION* 2 (3d ed. 2000))).

47. For example, the number of new international arbitration cases filed annually with the American Arbitration Association has steadily increased from 207 in 1993, to 510 in 2000, to 672 in 2002, meaning that annually it receives more cases than the ICC. TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH, Appendix 1 (Christopher R. Drahozol & Richard W. Naimark eds., 2005). Also the Hong Kong International Arbitration Centre and the Singapore International Arbitration Centre have developed into regionally prominent

improve the system. All together, these forces have produced significant gains for transparency.

1. Competition Among Arbitral Institutions

Arbitral institutions have led or promoted many of the major transparency innovations, which is not surprising since they are the principal policy makers of the international commercial arbitration system. Even in the simplest aspects of their arbitral rules, it is clear that collectively arbitral institutions have been adding precision and detail to attract more business parties to the system and to gain market share.⁴⁸ One example that illustrates this trend is the added clarity and transparency that has been brought to bear on arbitrator disclosures and disqualification decisions. Historically, arbitral rules allowed arbitrators to exercise their own subjective judgment about what information should be disclosed or should disqualify them.⁴⁹ More recently, institutions have moved to more objective standards, which have the effect of imposing some limitations on the opaque discretion of individual candidates.⁵⁰

Even if now framed in objective terms, most disclosure standards remain only vague qualitative requirements.⁵¹ Institutions, meanwhile, generally have the absolute and sole discretion to interpret these rules, and the leading institutions generally conceal from the parties how the rules are applied in particular cases.⁵² This just-trust-me approach

institutions with significant caseloads. Complementing the expansion in institutions, Dezalay and Garth describe the emergence of a new generation of international arbitrators. See DEZALAY & GARTH, *supra* note 44, at 34–37.

48. See Darlene S. Wood, *International Arbitration and Punitive Damages: Delocalization and Mandatory Rules*, 71 DEF. COUNS. J. 402 (2004) (noting that the ICC arbitration rules are routinely updated to adjust to changes in the “business climate”); Michael P. Malloy, *Current Issues in International Arbitration*, 15 TRANSNAT’L LAW. 43, 45 (2002) (noting that “competition among arbitration institutions for the growing number of international commercial arbitrations has moved their respective technical details closer to conformity”).

49. CRAIG, ET AL., *supra* note 46, at 214, n.26.

50. See Catherine A. Rogers, *The Vocation of the International Arbitrators*, 20 AM. U. INT’L L. REV. 957, 970–72 (2005) (discussing limitations).

51. For example, the International Chamber of Commerce (ICC) Rules require only that an arbitrator be “independent” of the parties. Int’l Comm. Arb. R. 7(2) (Jan. 1, 1998), *available at* http://www.iccwbo.org/court/english/arbitration/pdf_documents/rules/rules_arb_english.pdf (“Before appointment or confirmation, a prospective arbitrator shall sign a statement of independence . . .”). Despite the inherent ambiguity of this term, the ICC has not published criteria defining the meaning of “independent.” CRAIG ET AL., *supra* note 46, at § 13.03, 212. Similarly, the Rules of the London Court of International Arbitration (LCIA) require only that arbitrators be “impartial.” LONDON CT. INT’L ARB. R. art. 5.3 (1998), *available at* <http://www.lcia-arbitration.com> (following “Arbitration” hyperlink; then follow “English” hyperlink).

52. See Int’l Comm., *Guide to ICC Arbitration* 35 (ICC Publ’g S.A. 1994) (noting that with challenges to arbitrators the decisions of the ICC Court of Arbitration “on all such questions are final

adopted by the elite institutions could not be sustained by newer international arbitral institutions that do not have established track records and longstanding reputations. Newcomer institutions instead rely on more explicit codes of ethics and more transparent review procedures, which together remove disclosure decisions from the shadowy discretion of arbitrators⁵³ and signal the institution's commitment to the quality and integrity in decision making.⁵⁴

One of the most dramatic and important developments, which comes from one of the most established institutions, is the recent announcement by the LCIA that it will publish the LCIA Court's decisions on challenges to arbitrators.⁵⁵ Another important advance in the march toward transparency is the International Bar Association's new guidelines, which define clear classes of information that must be

and the reasons for the Court's decisions are not communicated"); LONDON CT. OF INT'L ARB. R. 29(1) (1998) ("The decisions of the LCIA Court with respect to all matters relating to the arbitration shall be conclusive and binding upon the parties and the Arbitral Tribunal. Such decisions are to be treated as administrative in nature and the LCIA Court shall not be required to give any reasons."). Notwithstanding the fact that it is not required by its rules to provide any reasons, the LCIA has nevertheless generally issued challenge decisions with reasoned explanations. See *LCIA News*, Volume 11:2, at 1 (June 2006) ("[T]he LCIA has long given reasons for its challenge decisions, notwithstanding Article 29.1 of its rules, by which these decisions are administrative in nature, with no requirement for reasons."). The ICC and SCC have occasionally published surveys or summaries of challenge decisions. See *id.*

53. For example, several institutions that are newer to international arbitration, such as the American Arbitration Association and the Milan Chamber of Arbitration, have elaborate codes of ethics detailing the obligations on arbitrators, as well as stated punitive mechanisms for violations of those codes. E.g., Am. Arb. Ass'n, Failure to Disclose May Lead to Removal from the National Roster of Neutrals, <http://www.adr.org/sp.asp?id=22241> (last visited Apr. 12, 2006); Article 13 of the Code of Ethics for the Camera Arbitrale Nazionale e Internazionale Milano, available at <http://www.camera-arbitrale.it/show.jsp?page=169945> ("The arbitrator who does not comply with this Code of Ethics shall be replaced by the Chamber of Arbitration, which may also refuse to confirm him in subsequent proceedings because of this violation.") (last visited Apr. 12, 2006). One of the most elaborate of these is the Hong Kong International Arbitration Centre (HKIAC), which in addition to a detailed code of ethics has established procedures for filing complaints against arbitrators. Hong Kong International Arbitration Centre, *Guidelines in Relation to Complaints Against an Arbitrator on HKIAC Panel of Arbitrators*, http://www.hkiac.org/HKIAC/HKIAC_English/main.html (follow "Sitemap" hyperlink; the follow "Guide to Appoint Arbitrators" hyperlink) (last visited Apr. 11, 2006). The HKIAC Arbitration Rules also uses its administrative body to remove arbitrators from their roster if their "suitability" is questionable or the arbitrator has been "removed or suspended from the panel of any other arbitral organization or has been removed or criticised by any state court."

54. The Hong Kong International Arbitration Centre offers such procedures. See Hong Kong International Arbitration Centre, *supra* note 53. The Chamber of National and International Arbitration of Milan and the American Arbitration Association also have adopted detailed codes and have published policies of refusing future appointments to arbitrators found to have violated it. Milan Chamber of Commerce-International Arbitration Rules, 2004 19, <http://www.jus.uio.no/lm/milan.chamber.of.commerce.international.arbitration.rules.2004/portrait>. The newly revised AAA Code can be found at <http://www.ibanet.org/pdf/InternationalArbitrationGuidelines.pdf> (last visited Jan. 2, 2006).

55. See *LCIA News*, *supra* note 52, at 1.

disclosed by arbitrator candidates.⁵⁶ The ultimate result of all these innovations is that arbitrator standards of conduct and enforcement mechanisms have become more transparent, and the gains are particularly strong at newer institutions.⁵⁷

2. Competition Among Arbitrators

Just as new institutions are using more precise rules to signal quality and reliability, so are new arbitrators. The new generation of arbitrators does not have the professional nobility or stature to invoke “grand principles of law” or vague notions of equity with the same innate sense of legitimacy on which the earlier generation relied.⁵⁸ Instead, they have adopted a more technocratic approach to arbitral decision making.⁵⁹ This technocratic approach appeals to modern parties, who are drafting increasingly complex and detailed contracts⁶⁰ that they want enforced with legal precision.⁶¹ As a result of these overlapping trends, the opaque compromise-oriented outcomes of the past have been largely displaced with more meticulously reasoned awards⁶² that are expressly based on the law selected by the parties.⁶³ This march toward more formalized

56. Am. Arbitration Ass’n, *IBA Develops New Arbitrator Guidelines*, 59 DISP. RESOL. J. 7 (2004). These guidelines are more detailed and specific than an earlier code that the IBA had developed, which itself was considerably more detailed than rules at the most elite institutions.

57. For example, institutions like the Hong Kong International Arbitration Centre, the Singapore International Arbitration Centre and the Australian Institute of Arbitration have adopted, with some modifications, the UNCITRAL Arbitration Rules. PIETER SANDERS, *QUO VADIS ARBITRATION?* 13 (1999). The UNCITRAL rules are more detailed, particularly on procedural issues, than institutional rules at some of the more renowned institutions, such as the ICC. BETTE J. ROTH ET AL., 1 ALTERNATIVE DISPUTE RESOLUTION PRACTICE GUIDE § 19:3 (1993).

58. DEZALAY & GARTH, *supra* note 44, at 33–62, 89–90.

59. See *id.* at 34–41 (describing the difference between “technocratic” and “grand old men” arbitrators).

60. Yassin El-Ayouty, *Challenges Facing Inter-Governmental Political Negotiations Which Are Common to International Business Negotiators: An Analysis of Shared Concerns*, 3 ILSA J. INT’L & COMP. L. 829, 832 (1997) (arguing that in drafting international contracts, American parties “often attempt [] to deal with every possible contingency” (quoting TRENHOLME J. GRIFFIN & W. RUSSELL DAGGATT, *THE GLOBAL NEGOTIATOR: BUILDING STRONG BUSINESS RELATIONSHIPS ANYWHERE IN THE WORLD* 109 (1990))); Jeswald W. Salacuse, *Renegotiating International Business Transactions: The Continuing Struggle of Life Against Form*, 35 INT’L LAW. 1507, 1535–36 (2001) (describing how parties write detailed contracts that “seek to foresee all possible eventualities”).

61. See generally Drahozal, *supra* note 1 (reporting results of empirical research that demonstrate parties overwhelmingly choose national law and hypothesizing that national law is preferred because it is more predictable than alternative transnational legal rules).

62. See William W. Park, *Income Tax Treaty Arbitration*, 10 GEO. MASON L. REV. 803, 823 (2002) (“The marketplace has pushed international arbitration toward reasoned awards.”).

63. One of the earliest indicators of the “strong balance of international opinion in favour of the giving of reasons by arbitrators” is the European Convention of 1961, which created a presumption in favor of reasoned awards in the absence of contrary party agreement. See Hon. Lord Justice

and transparent decision making can be measured in the longer and more detailed awards it produces.⁶⁴

3. Competition Among Participants

Competition among lawyers and arbitrators from different systems within individual arbitrations has also resulted in evidence gathering and argumentation procedures becoming more predictable and standardized. Traditionally, the procedures for gathering and presenting evidence and argumentation were relatively malleable and were, as a practical matter, crafted on a case-by-case basis to suit the preferences and predilections of individual arbitrators and parties. As James Carter explains,

new international arbitration 'players' [sought] transparency in the rules, procedures and institutional arrangements [because they were] impatient with customs and understandings not accessible to them, and they [were] suspicious of the idea that there [was] or [might have been] an inner 'club' of practitioners and arbitrators from which they [were] excluded.⁶⁵

In other words, substantially harmonized and standardized international arbitration procedures developed⁶⁶ based on pressure from new players—

Bingham, *Reasons and Reasons for Reasons: Differences Between a Court Judgment and an Arbitral Award*, 4 ARB. INT'L 141 (1988). This shift in presumptions about the degree of arbitrator discretion is also illustrated in ICC Rules, which require that awards are rendered with reasons and which expressly prohibit arbitrators from acting as *amiable compositeurs* unless the parties agree, which the parties virtually never do. See Int'l Comm. Arb. R. art. 17(3) (Jan. 1, 1998), available at http://www.icowba.org/court/english/arbitration/pdf_documents/rules/rules_arb_english.pdf (regarding *amiable compositeurs*); *id.* art. 25(2) (requiring reasoned awards). Similarly, the AAA Web site provides "A Guide for Commercial Arbitrators," in which it admonishes, "You should not compromise unless the dispute clearly calls for this result. Parties generally expect a decision on the issues." American Arbitration Association, *A Guide for Commercial Arbitrators*, <http://www.adr.org/sp.asp?id=22016> (last visited Jan. 12, 2006).

64. A limited, random sampling of the ICC awards published in the YEARBOOK OF INTERNATIONAL ARBITRATION illustrates this point. The average length of ICC awards contained in the volumes for 1986 and 1987 were 5.7 pages and 8.4 pages, respectively. Flash forward to 2003 and 2004, and the average length of awards has increased to 16.5 pages and 20 pages for those years. Notably, these are excerpts of actual awards, which, according to German arbitration specialist Stephan Wilske, dramatically under represent the length of full awards. He reports that "even with an amount in dispute of less than USD 1 million, a final award by ICC tribunals . . . is far beyond 50 pages and strives more in the direction of 100 pages." Email from Stephan Wilske, October 10, 2006 (on file with author). Wilske also notes that he receives "quite some awards" with more than 100 pages. See *id.*; see also Donald P. Arnava & Rt. Hon. Lord David Hacking, *Using ADR to Resolve International Contract Disputes*, 04-11 BRIEFING PAPERS 1 (2004) ("Reasoned awards have always been the norm in international arbitration, but with the shift to more formalized and rule-based decision making, awards have necessarily become longer and more detailed.").

65. James H. Carter, *International Commercial Dispute Resolution*, DISP. RESOL. J., Apr. 1996, at 95, 98.

66. This phenomenon has been well documented and discussed in the literature. See Gabrielle

in particular, from the American players who began arriving in large numbers.⁶⁷ James Carter's explanation is again illuminating:

The arbitration world . . . has . . . articulated[ed] and standardize[ed] many of the aspects of international proceedings, so that newcomers will be able to find their way without undue difficulty [T]he "unwritten" procedures—those typically followed but not written into the formal rules and previously often passed down in internal administrative form—now appear in guidelines of all sorts available to the reader with access to a decent arbitration library.⁶⁸

One of the most visible of these sources Carter describes is the evidentiary and procedural rules developed by the International Bar Association,⁶⁹ and the new standards for arbitrator conduct described above.⁷⁰

Greater transparency has also developed as a by-product of voluntary and involuntary disclosures made by increasingly adversarial and competitive parties. Resistance to a request for security or for discovery, or opposition to enforcement of an award may prompt the opposing party to resort to a national court, with the result being disclosure of details about the arbitration.⁷¹ Similarly, while one party has strategic reasons to maintain an award as confidential, in many cases, the opposing party may have tactical reasons to disclose it. Absent specific contractual provisions obliging confidentiality,⁷² and on some occasions despite such

Kaufmann-Kohler, *Globalization of Arbitral Procedure*, 36 VAND. J. TRANSNAT'L L. 1313, 1322–23 (2003) (referring to the development of "standard arbitration procedure" that "merge[s] different procedural cultures"); Serge Lazareff, *International Arbitration: Towards a Common Procedural Approach*, in CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION: OLD ISSUES AND NEW TRENDS 31 (Stefan N. Frommel & Barry A.K. Rider eds., 1999) (referring to "an emerging 'harmonised procedural pattern'"); accord Lara M. Pair, *Cross-Cultural Arbitration: Do the Differences Between Cultures Still Influence International Commercial Arbitration Despite Harmonization?*, 9 ILSA J. INT'L & COMP. L. 57, 58 (2002) (arguing that "despite harmonization of procedural rules . . . expectations of the process differ based on cultural background of parties or arbitrators").

67. Elena V. Helmer, *International Commercial Arbitration: Americanized, "Civilized," or Harmonized?*, 19 OHIO ST. J. ON DISP. RESOL. 35, 40 (2003) ("The number of American law firms and lawyers offering arbitration services (either as counsel or, in the case of individuals, also as arbitrators) is on the rise . . . since the 1970s and early 1980s.").

68. Carter, *supra* note 65, at 98.

69. See generally IBA Rules on the Taking of Evidence in International Arbitration ("IBA Rules") available at http://www.asser.nl/ica/documents/cms_ica_4_1_IBA_ROEZ.PDF (last visited Apr. 12, 2006).

70. See *supra* notes 54–56, and accompanying text.

71. Alexis C. Brown, *Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration*, 16 AM. U. INT'L L. REV. 969, 1004–05 (2001).

72. "Although there is a widely-held view that arbitration is confidential, in the absence of a specific provision in the arbitration agreement or the institutional rules, the legal basis for a requirement of confidentiality is unclear." Hans Smit, *Confidentiality: Articles 73 to 76*, 9 AM. REV.

provisions, parties may also make strategic disclosures, either at the encouragement of a trade organization monitoring the activities of its members or out of a desire to publicize their vindication and signal their strength to the market. Whether these disclosures are part of a request for assistance from national courts or are volunteered for self-interested reasons, they reveal many features of the international commercial arbitration system, ultimately rendering it more transparent.

4. Award Publication

One of the most significant transparency breakthroughs, as noted by several scholars, is that international commercial arbitration awards are being voluntarily published with greater frequency.⁷³ Historically, prior arbitral experience has been an important resource for parties, arbitrators' and institutions. Parties and arbitrators invoked experiences and outcomes in earlier cases to persuade later tribunals,⁷⁴ and institutions relied internally on their prior decisions to maintain a sense of continuity and rationality. This practice was, in many respects, analogous to private letter rulings by the IRS, which were known and used by large law firms that could collect a private "library" of such rulings.⁷⁵ Such private

INT'L ARB. 233, 233 (1998); *see also* Francois Dessementet, *Arbitration and Confidentiality*, 7 AM. REV. INT'L ARB. 299, 318 (1996) ("The legal or institutional rules [regarding confidentiality] are scant.").

73. *See* Dora Marta Gruner, *Accounting for the Public Interest in International Arbitration: The Need for Procedural and Structural Reform*, 41 COLUM. J. TRANSNAT'L L. 923, 959 (2003) ("Today, several arbitral institutions, as well as independent publishers, have started to regularly publish arbitral awards."). *But see* Tom Ginsburg, *The Culture of Arbitration*, 36 VAND. J. TRANSNAT'L L. 1335, 1340 (2003) ("Although certain sources for arbitral decisions exist . . . they are but the tip of the iceberg of all the cases produced . . . and . . . the ICC awards are an explicitly biased sample as the ICC seeks to publish particularly interesting or unusual awards.").

74. *See* Carbonneau, *supra* note 1, at 607-08 ("In current practice [in the 1980s], the practitioners who represent arbitrating parties often refer to the substance of past awards when attempting to guide the arbitral tribunal in its determination.").

75. The Internal Revenue Service maintained as confidential private letter rulings, which provided interpretations of various tax rules. While rulings could not be cited as precedent, they created a "body of law known only to a few members of the tax profession, such as Washington law or accounting firms with libraries containing the PLRs of its clients." Kimberly A. Butlak, *All's Fair in Love, War, and Taxes: Does the United States Promise Fair Tax Competition in a Global Marketplace Consistent with European Community and Organization for Economic Co-operation and Development Recommendations through its Advance Ruling Program?*, 13 IND. INT'L & COMP. L. REV. 99, 114 (2002). The confidentiality of these rulings was forcibly challenged by smaller firms through court proceedings based on Freedom of Information Act requests. *E.g.*, *Tax Analysts v. I.R.S.*, 362 F. Supp. 1298, 1310 (D.D.C. 1973) (holding, "Publication would simply make available to all what is now only available to a select few, and subject the rulings to public scrutiny as well"). This case prompted Congress to enact 26 U.S.C. § 6110 as an amendment to the Tax Reform Act of 1976, which requires that "written determinations," such as private letter rulings and technical advice memoranda, must be open for public inspection after the Secretary redacts all identifying information. 26 U.S.C. § 6110(a)-(c) (2000). There were subsequent efforts by the IRS to maintain such information as confidential by issuing it in Field Service Advice memoranda

libraries of arbitral awards had provided privileges to members of an exclusive club. Now, arbitral institutions have pushed for increasing publication, with some institutions even shifting to a presumption in favor of redacted awards in the absence of party objection.⁷⁶ Now that awards are increasingly published, they form a more transparent body of non-binding, but highly persuasive, precedents for use by all.⁷⁷

B. Scholarly Research and the Market for Information

Another important source of information that has made the system more transparent is the swell of scholarly, sociological, and empirical research that explains how various aspects of the international commercial arbitration work. Given the enormous dollar amounts at stake, not only in the outcomes of individual cases, but also in attracting arbitration business, it is not surprising that numerous resources have sprung up. Today, there are literally hundreds of treatises, manuals, and articles guiding parties on everything from how to draft an arbitration clause,⁷⁸ to how to select an arbitrator,⁷⁹ to how to “get the discovery you

(FSAs) instead of the earlier forms, but the use of this format eventually was held to be subject to disclosure requirements. *Tax Analysts v. I.R.S.*, 117 F.3d 607, 616–18 (D.C. Cir. 1997).

76. American Arbitration Association, International Dispute Resolution Procedures Art. 27(8), available at <http://www.adr.org/sp.asp?id=22090#Awards> (last visited Aug. 25, 2006) (“Unless otherwise agreed by the parties, the administrator may publish or otherwise make publicly available selected awards, decisions and rulings that have been edited to conceal the names of the parties and other identifying details or that have been made publicly available in the course of enforcement or otherwise.”).

77. See Klaus Peter Berger, *International Arbitration Practice and the Unidroit Principles of International Commercial Contracts*, 46 AM. J. COMP. L. 129, 149 (1998) (“[A]rbitral awards more and more assume a genuine precedential value within the international arbitration process.”); Kenneth-Michael Curtin, *Redefining Public Policy in International Arbitration of Mandatory National Laws*, 64 DEF. COUNS. J. 271, 279 (1997) (“Publication of arbitral awards . . . is becoming more common, thus alleviating the difficulties associated with a lack of precedent.”); William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 LA. L. REV. 677, 719 (2000) (“With each passing year, there is an ever-increasing volume of reported arbitral awards (particularly in civil law jurisdictions, as well as in the United States), and arbitrators are tending more and more to refer to previous awards rendered in similar cases, thus gradually developing a system of arbitral precedent.”); *cf.* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 103 cmt. b (1986) (noting that while adjudicative opinions are not formally treated as stare decisis under international law, arbitral awards and other international court decisions have been treated as highly persuasive evidence of customary international law); *International Decisions*, 96 AM. J. INT’L L. 198 (Bernard H. Oxman ed., 2002) (noting that with regard to noncommercial contexts “the [ICJ] has invoked other international arbitral awards . . . on [some] occasions, and has even brought some within the ambit of precedents that it will consider on a par with its own prior decisions.”).

78. See, e.g., GARY BORN, *INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS* (forthcoming 2006); Lucy F. Reed, *Drafting Arbitration Clauses*, in *INTERNATIONAL BUSINESS LITIGATION & ARBITRATION* 553, 568 (2002).

79. Eric W. Lawson, Jr., *Arbitrator Acceptability: Factors Affecting Selection*, *ARB. J.*, Dec. 1981, at 22; K.V.S.K. Nathan, *Well, Why Did You Not Get the Right Arbitrator?*, *MEALEY’S INT’L*

need,”⁸⁰ to how to be an effective advocate generally in arbitration proceedings.⁸¹ These resources are principally the work of the top international arbitration specialists, who use these publications as a form of elite advertising,⁸² but incidental beneficiaries are other users of the system. These products render the mysterious inner workings of the arbitration system more transparent.

Other research has taken specific aim at illuminating the dark corners of the system. An important work in this vein is Yves Dezalay and Bryant Garth’s book, which compiles the results of more than 300 personal interviews they conducted with “brokers, courtiers, and learned compradors”⁸³ who are the “key actors”⁸⁴ in the international arbitration system. This groundbreaking work provided a significant aperture into the inner workings of the system because, as several top scholars have observed, the “skeletal nature of most statutes and institutional rules” means that “what an arbitration looks like will largely be determined by the identity of the parties’ counsel and of the arbitrators themselves.”⁸⁵ Debriefing the personnel of international arbitration provided critical revelations about the actual functioning of appointments and decision making within the system, as well as explanations about how and why international arbitration practice has changed over time.⁸⁶

ARB. REP., July 2000, at 24.

80. See, e.g., Nathan D. O’Malley & Shawn C. Conway, *Document Discovery in International Arbitration—Getting the Documents You Need*, 18 TRANSNAT’L LAW. 371 (2005) (discussing discovery techniques in international arbitration).

81. See generally, THE ART OF ADVOCACY IN INTERNATIONAL ARBITRATION (R. Doak Bishop ed., 2004) (describing international advocacy techniques).

82. Several commentators have theorized that by publishing about means for improving the system, arbitrators are likely signaling what has been referred to as “legal internationalism.” See Drahozal, *supra* note 1, at 549–50 (positing that “[b]y publishing books and articles and speaking at conferences on transnational law, prospective arbitrators may be signaling that they have what Stephen R. Bond calls ‘legal internationalism’”). For example, while the ICC Rules themselves provide only a skeletal outline of ICC procedures, the leading treatise on ICC arbitration makes accessible the wealth of experience of its authors who are all “high-profile members of the international arbitration bar.” *Recent Publications*, 26 YALE J. INT’L L. 527, 553 (2001).

83. DEZALAY & GARTH, *supra* note 44, at 9–13.

84. *Id.* at 18.

85. Alan Scott Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40 TEX. INT’L L.J. 449, 449 (2005).

86. Another incidental benefit of this research is that it pressures international arbitration to improve itself, for example by diversifying the pool of arbitrators to include women. As Dezalay and Garth noted, earlier there were no women in international arbitration’s inner circle, and there are still few. See DEZALAY & GARTH, *supra* note 44, at 34–37 (describing the role of old men in international arbitration). Several scholars, and the Scorecard, have noted steady gains that are being made for women, but in part this progress may be attributable to the attention finally paid to the problem as a result of empirical research into the pool of potential arbitrators. See Michael D. Goldhaber, *Madame La Présidente*, AM. LAW.-FOCUS EUROPE, Summer 2004, <http://www.americanlawyer.com/focuseurope/arbitration04.html> (“Because arbitration has traditionally been confidential, the appointing parties and institutions have not, until now, been

Other efforts have targeted more specific questions. Christopher Drahozal and Richard Naimark have compiled all the significant empirical research on international arbitration, providing for each study a critique and guidance for future research.⁸⁷ The various studies catalogue and quantify information on a range of topics, including arbitration procedures, arbitrator selection, and designation of choice of law.⁸⁸ Several other empirical projects are already underway,⁸⁹ which will build on the empirical landscape rendered by Drahozal and Naimark.

In addition to research by academicians, a healthy market for information about arbitration services has developed for use by practitioners. One of the more ambitious projects, seeking to provide "[a]n inside look at more than 100 major disputes from the secret world of arbitration,"⁹⁰ is the *American Lawyer* magazine's "Focus Europe" column. The feature publishes an "Annual Scorecard" on international commercial arbitration, which gathers and publishes information about the largest arbitrations from "one or more lawyers involved in each arbitration, supplemented in some cases by arbitration or court papers, securities disclosures, and press clippings."⁹¹

What emerges from this survey of transparency gains is that, rather than external pressure, they are the product of a range of collective, institutional and individual initiatives, leavened by a healthy dose of competition and drawing upon collaterally disclosed information.

C. *Historical Reform from Within & New Critics from Outside*

It is somewhat counter-intuitive that arbitration insiders have championed many of the most important transparency reforms since they collectively lost systemic advantages afforded by the ability to unilaterally reference informal sources.⁹² At least part of the motivation

subject to pressure from the media [to diversify along gender lines].").

87. See generally TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH, *supra* note 47 (applying quantitative empirical research to the study of international arbitration).

88. For additional empirical research on choice of transnational or international legal principles, see generally Drahozal, *supra* note 1 (reporting results of empirical research designed to test the frequency with which parties contract out of national law by selecting transnational legal principles to govern their dispute).

89. See, e.g., Survey, www.ccls.edu/icltu/research/sia/research/questionnaire.html.

90. Michael D. Goldhaber, *Arbitration Scorecard*, AM. LAW.-FOCUS EUROPE, Summer 2005, available at <http://www.americanlawyer.com/focuseurope/scorecard0605.html>.

91. *Id.*

92. Robert Wai argues that antipoetic systems such as international arbitration can allow "those actors with the resources, scale, and expertise to monitor a complex regulatory terrain . . . will be the most able to advance their interests." See Robert Wai, *Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization*, 40

for this movement toward greater publication is competitive pressure and individual benefits that might be enjoyed when awards are published.⁹³ Some transparency initiatives, however, have also been fostered by cooperative efforts to improve the system as a whole. As I will describe in more detail in Part IV.B., this inclination toward cooperative improvement of the system may be a weather vein pointing toward the most promising sources for future transparency reforms.

To understand why, it is important to note that cooperative reform from within presents something of a puzzle in comparison with the related fields of domestic and investment arbitration, where public outcry and government intervention have been the catalysts for increased transparency. For example, in domestic consumer arbitration in California, “a series of articles featuring horror stories about the inequities of arbitration” in the San Francisco Chronicle prompted public outcry.⁹⁴ In response, the California Legislature passed strict new rules requiring disclosure of financial and administrative information about consumer arbitrations⁹⁵ and detailed professional and biographical information by arbitrator candidates in the selection process.⁹⁶

Following a strikingly similar pattern, the first NAFTA arbitration decisions prompted a derisive article in *The New York Times*, a full-page

COLUM. J. TRANSNAT'L L. 209, 264 (2002). Dezalay and Garth argue that the unwritten and flexible nature of the *lex mercatoria* allowed arbitrator insiders to maintain their grip on the market for arbitrator services in the face of new competition. DEZALAY & GARTH, *supra* note 44, at 45–46. But see Drahozal, *supra* note 1, at 549–50 (2005) (questioning Dezalay and Garth's theory).

93. While perhaps costing them some strategic advantage, award publication can also provide a competitive opportunity to signal arbitrators' and institutions' experience and expertise, particularly when they implicate important and novel points of procedure. Notably, while the parties' names and geographic information is usually redacted when awards are published, reference to arbitrators and institutions remain in tact. See Jurispub.com, <http://www.arbitrationlaw.com/books/book.php?id=244> (advertising the STOCKHOLM INTERNATIONAL ARBITRATION REVIEW as a book that has “adopted the policy . . . [of] publish[ing] the names of counsel and arbitrators when reporting on arbitral awards and court decisions” because parties need information about the arbitrators they are selecting). While party consent remains an important prerequisite for most award publication, arbitrators and institutions can exert significant pressure and influence in persuading the parties to consent.

94. Ruth V. Glick, *California Arbitration Reform: The Aftermath*, 38 U.S.F. L. REV. 119, 120 (2003).

95. See Keisha I. Patrick, *A New Era of Disclosure: California Judicial Council Enacts Arbitrator Ethics Standards*, 2003 J. DISP. RESOL. 271 (citing California Code of Civil Procedure § 1281 as requiring private arbitration providers to disclose certain financial and other information about consumer arbitrations they administer). Notably, this California law is currently being challenged as violative of the FAA. *Id.*

96. Ruth V. Glick, *Should California's Ethics Rules be Adopted Nationwide?: No! They Are Overbroad and Likely to Discourage Use of Arbitration*, 9(1) DISP. RESOL. MAG. 13 (Fall 2002); *Judicial Council Of California Adopts Ethics Standards for Private Arbitrators*, 13 WORLD ARB. & MEDIATION REP. 176 (2002) (noting that notwithstanding adoption of new standards, several members suspect that the volume of information that must be disclosed under California's new standards “may be too burdensome” and could “be used too readily” to disqualify arbitrators).

advertisement in *The Washington Post* attacking investment arbitration as a "Fast Track Attack on America's Values," and a Bill Moyers PBS special that critiqued NAFTA as "an end-run around the Constitution" in which "secret NAFTA tribunals can force taxpayers to pay billions of dollars in lawsuits."⁹⁷ Respected NGOs such as the World Wildlife Fund assailed investor-state arbitration as "lacking transparency" and "shockingly unsuited to the task of balancing private rights against public goods."⁹⁸ The predictable response to the ensuing public outrage was legislative calls to make investment arbitration more transparent and predictable by ensuring public access and participation as *amicus curiae* in investment arbitration proceedings.⁹⁹

In this regard, the role of international commercial arbitration scholars and insiders presents a study in opposites. While most commentators in the domestic contexts are skeptics who focus on the numerous profound power differentials that characterize most disputes,¹⁰⁰ international commercial arbitration scholars have traditionally been insiders who have worked, or still work, within the system. Their efforts aim at describing how the system can be improved, and they generally adopt public-minded positions to signal their professional nobility.¹⁰¹ When they criticize the system and call for improvement, their tone is most often that of loyal opposition from within, not that of external detractor.¹⁰²

97. These and related events are described in detail by two prominent arbitrator-scholars, Guillermo Alvarez and Rusty Park. See Guillermo Aguilar Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT'L L. 365, 338-84 (2003) (discussing reactions to the first Chapter 11 cases).

98. *Id.* at 384 (quoting HOWARD MANN, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT AND WORLD WILDLIFE FUND, PRIVATE RIGHTS, PUBLIC PROBLEMS: A GUIDE TO NAFTA'S CONTROVERSIAL CHAPTER OF INVESTOR RIGHTS 46 (2001)).

99. See *id.* at 386 (noting legislative responses); see generally Chris Ford, *What Are "Friends" For? In NAFTA Chapter 11 Disputes, Accepting Amici Would Help Lift the Curtain of Secrecy Surrounding Investor-State Arbitrations*, 11 SW. J.L. & TRADE AM. 207 (2005); Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 AM. J. INT'L L. 611 (1994).

100. See, e.g., Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1 (1987); Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669 (2001); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1 (1997).

101. For example, international arbitrators usually take civic-minded positions in favor of enforcing mandatory national laws and fighting against bribery. See, e.g., William W. Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 TUL. L. REV. 647, 649 (1989) ("Belgium has gone so far as to eliminate any right to have an award set aside, even for such defects as arbitrator fraud and excess of authority, unless at least one party is Belgian.").

102. See Richard M. Buxbaum, *Introduction*, 4 INT'L TAX & BUS. LAW 205, 208 (1986) ("The practice of arbitration needs to become familiar, routine, and comfortable."); Carbonneau, *supra*

More recently, as noted in the Introduction, international commercial arbitration has attracted some skeptics, who are calling for compulsory transparency reforms.¹⁰³ To date, the number has been few, and their proposals have demonstrated an appreciable sense of reserve.¹⁰⁴ Regardless of whether critiques will materialize into a full-fledged attack on confidentiality in international commercial arbitration, they provide an important opportunity to consider how transparency can and should evolve in international commercial arbitration. In the next Part I consider whether refinement of disclosure obligations may be a better mechanism for addressing the concerns raised by skeptics than forcibly imposed transparency reforms, as the competitive and cooperative forces that are already set in motion continue to propel the international commercial arbitration system voluntarily toward greater transparency.

IV. THE FUTURE OF TRANSPARENCY

Notwithstanding all the progress catalogued above, international commercial arbitration is not a wholly, or even mostly, transparent system. Researchers continuously lament about the difficulties in assembling information as a result of continued secrecy in international arbitration,¹⁰⁵ and there remain concerns that insiders continue to enjoy

note 1, at 606 (suggesting beneficial aspects of rendering reasoned awards); Thomas E. Carbonneau, *Arbitral Adjudication: A Comparative Assessment of its Remedial and Substantive Status in Transnational Commerce*, 19 TEX. INT'L L.J. 33, 39 (1984) (promoting reasoned awards and their publication); Bernardo M. Cremades & Steven L. Plehn, *The New Lex Mercatoria and the Harmonization of the Laws of International Commercial Transactions*, 2 B.U. INT'L L.J. 317, 336–37 (1984) (suggesting “the formation of institutions which give arbitrators access to prior arbitration awards and require them to follow a more or less strict rule of *stare decisis*”); Julian D.M. Lew, *The Case for the Publication of Arbitration Awards*, in *THE ART OF ARBITRATION* 223 (Jan C. Schultz & Albert Jan van den Berg eds., 1982) (reviewing the advantages of publication of awards).

103. See generally Buys, *supra* note 2; Gruner *supra* note 2. These efforts can be regarded as a subset of broader efforts to regulate multinational corporations. Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law*, 37 COLUM. HUM. RTS. L. REV. 287, 304 (2006) (describing the “monitoring and disclosure movement” in the context of corporate regulation as seeking to impose greater “accountability and transparency for the benefit of shareholders . . . the public”).

104. For the most part, international commercial arbitration has avoided the ire that domestic arbitration and investment arbitration have attracted because it usually involves disputes between two large, well-matched companies and disputes often revolve around contractual agreements. Skepticism about domestic arbitration is borne out of the profound power differentials that characterize most disputes. As Katherine Stone observes, this power imbalance has turned arbitration from a mechanism for resolving disputes among “shared normative communities” into “a proceeding devised by insiders to be imposed on outsiders.” See Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 1015–24 (1999) (arguing that “[c]urrent uses of arbitration, however, are a far cry from the craft guild model” for which arbitration and FAA standards were originally conceived).

105. For example, in describing its methodology, the author of the Arbitration Scorecard

unfair advantages because of the lack of transparency.¹⁰⁶ While there is an impressive level of support and complicity within the system, there is also inevitable resistance to transparency, both at an institutional level¹⁰⁷ and an individual level.¹⁰⁸ More importantly, there are and will always be parties who are interested in maintaining their disputes as confidential. Newfound skeptics seek to challenge this state of affairs when public interests are at stake. In this final Part I consider the future of transparency in international commercial arbitration. Section A examines the skeptics' concerns and concludes that the most efficient manner for providing necessary information is through disclosure obligations because forcibly imposed transparency reforms will require considerable system restructuring. Section B concludes by reviewing the benefits the system could gain by more systematically, but voluntarily, committing transparency reforms.

A. Compulsory Transparency Reforms Versus Disclosure Obligations

Arguments in favor of forcibly imposed transparency reforms are predicated on an assumption that a structural opening of an international commercial arbitration system is the only way to ensure that information generated in the system reaches members the interested public.¹⁰⁹

cautions readers about potential inaccuracies because "in many cases we have had to rely on information from only one side in the dispute." Goldhaber, *supra* note 86. Drahozal and Naimark explain more generally the research challenges. "Arbitration proceedings themselves are private and thus difficult to study. The nature of the process adds to that difficulty. Much of what happens (such as with respect to discovery) may not be documented in any central case file." TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH, *supra* note 47, at 81.

106. Many within the system express concern that information disparities between insiders and newcomers can work to the systematic disadvantage of developing nations, although this critique is also intensely disputed.

107. As the publishers of the Scorecard recount:

Our first survey ruffled feathers in June 2003 when it publicized 40 disputes with stakes above \$200 million. The secretary-general of the International Chamber of Commerce International Court of Arbitration voiced objections to the survey at that year's meeting of the International Bar Association. But, once started, the momentum of public disclosure is unstoppable. Our aim is to map an uncharted universe, to capture its drama and identify its main players.

Goldhaber, *supra* note 86.

108. See John Beechy, *International Commercial Arbitration: A Process Under Review and Change*, 55 DISP. RESOL. J., 32, 34 (2000) ("Not long ago, I heard an eminent international arbitrator suggest that recourse to what he described as 'constructive ambiguity' in the drafting of an arbitral award was appropriate and justified if the arbitrator felt that it might bring about a position in which the parties settled their differences.").

109. Buys argues that increased transparency will benefit not only the "public" or third parties, but also the users of the international arbitration system. See Buys, *supra* note 2, at 136. Her arguments for imposing such reforms over party objection appear, however, to be more closely tied to notions of benefits for those outside the system.

Proponents of this view recognize that structurally imposed transparency reforms can increase the costs of proceedings and interfere with parties' legitimate expectations in maintaining confidentiality,¹¹⁰ but they conclude that the benefits of added transparency outweigh these costs, even if neither is easily quantifiable. I argue that disclosure is a more efficient and practical mechanism for securing most publicly important information that is generated in international arbitration, as well as monitoring the products of the system.

1. Targeted Disclosure versus Structural Transparency Reforms

Transparency advocates focus on "unsavory corporate practices" that may be revealed in international arbitration, such as exploitation of child labor, degradation of the environment, or corporate perpetration of human rights abuses.¹¹¹ They argue that the public has an interest in learning about such abuses before making investment or consumer decisions, and that interest necessitates transparency reforms.¹¹²

There are two principle problems with securing this information through mandatory transparency reforms. First, mandatory transparency reforms implemented across the board will be overly broad, but there is no obvious or acceptable manner for determining which subset of cases involves identifiable public interests. The second problem is that mandated transparency reforms would have to be implemented at the international level.¹¹³ Parties and individuals opposed to such reforms could easily avoid them by resorting to rogue institutions or *ad hoc* arbitrations that are less transparent than the current system. To deter development of this kind of gray market for arbitration services, states would have to refuse enforcement of arbitral awards that did not conform to the new transparency requirements. This new ground for refusing to enforce awards would require not only amendment to the New York Convention, but a fundamental restructuring of its essential balance. Currently, the Convention defers to party preference on procedures and

110. See *id.* at 137–38 ("There are, of course, costs to making arbitration more transparent."); Gruner, *supra* note 2, at 959–60 ("Both the arguments for confidentiality and those for transparency are supported by strong justifications.").

111. See Buys, *supra* note 2, at 135 (noting that consumers may pay higher prices as a result of an arbitral award or that arbitration may "expose unsavory corporate practices, such as use of child labor or poor environmental protection, which the public may wish to know in making decisions about purchases and investments").

112. See *id.* at 135–37 (listing the public's right to knowledge of corporate abuse as one of the many benefits of transparency).

113. Existing mandatory transparency reform proposals contemplate either rule changes at the level of arbitral institutions or the creation of a super-national authority. See Gruner, *supra* note 2, at 955 (listing several levels at which changes in international arbitration can take place).

refuses enforcement only for the most egregious procedural abuses. While increased transparency is worthy objective, it is hardly likely to generate the kind of political support that would be needed for such a sweeping reform.

Fortunately, radical restructuring is probably not necessary to satisfy most of the relevant public interests that have been identified. Drawing from the distinctions identified in Part I, the public interests identified by proponents of transparency reforms generally lay in substantive information about what the arbitrating corporations are doing. Less often is the public interest aimed at monitoring the arbitrators who are deciding cases. To take one perhaps paradigmatic example, ChevronTexaco filed an arbitration case seeking indemnification from its joint venture with the Ecuadorian government for any finding of liability in a billion dollar claim filed on behalf of indigenous people based on allegations of environmental devastation and human rights abuses. Like most claims of corporate malfeasance, the arbitral proceedings involve ancillary commercial claims, such as indemnification claims, because it is still rare that human rights' victims bring claims directly in arbitration.¹¹⁴ It is fair to say that the public has relatively little (or at least significantly less) interest in whether the indemnification is available than in the underlying abuses giving rise to the human rights claims. In other words, the public interest lies mostly with what ChevronTexaco did in Ecuador rather than what the arbitrator will do with related claims of indemnification.

Information about the ChevronTexaco's liability and potential indemnification that is developed in the arbitration may already be subject to financial disclosure obligations. As noted above, financial disclosures required by national securities laws are already an important source of information about international arbitration cases.¹¹⁵ Although framed as disclosures to aid investment decision making, firms such as ChevronTexaco must also disclose potential environmental liability.¹¹⁶ In addition to mandated disclosures, particularly with cases involving larger and more egregious abuses, it will be difficult to maintain the existence of arbitral proceedings or outcome of an award as confidential.

114. This may not always be the case as "lending and insurance institutions impose obligations on corporate borrowers to secure government compliance with international standards on environmental, human rights, and social policy" or if third party beneficiaries are granted rights in investment agreements, as Roger Alford predicts. Alford, *supra* note 41, at 236–37.

115. See *supra* notes 91–92 and accompanying text (discussing the use of financial disclosures by private research firms in conducting empirical research).

116. Cheryl L. Wade, *Attempting to Discuss Race in Business and Corporate Law Courses and Seminars*, 77 ST. JOHN'S L. REV. 901, 912 (2003) (noting that Item 303 of Regulation S-K mandates disclosure of potential environmental liability).

With the ChevronTexaco arbitration, several sources have reported the filing of the case,¹¹⁷ including the company itself.¹¹⁸

To be sure, voluntary and mandatory disclosure obligations are not perfect sources of information. As currently framed, disclosure regulations are vague and subject to manipulation by managers whose interests are not aligned with the public's interest in learning about corporate abuses. These limitations are not inherent in disclosure as a mechanism, but rather how current disclosure obligations have been framed. New disclosure standards can be more carefully tailored to provide information that is not only relevant to investors, but other interested members of the public. Steps have already been taken in this direction. Proposals for requiring disclosure of socially and environmentally important conduct have been made in the United States,¹¹⁹ and have already been implemented in France.¹²⁰ As companies boast of their own corporate social responsibility, failure to disclose information that contradicts those boasts can be a basis for securities fraud actions.¹²¹

Even with these expansions, general disclosure obligations may be an imperfect net for capturing all public interests in international arbitration because regulators cannot always capture in *ex ante* regulation what information will be of public interest in later cases.

The limitations of general disclosure obligations are not present in case-specific disclosures. As noted above, parties are increasingly turning to national courts for assistance in obtaining discovery, interim relief, and award enforcement,¹²² which result in information from

117. See <http://www.hugheshubbard.com/news/newspage.asp?PracticeArea=14%7CArbitration+%26+Alternative+Dispute+Resolution&From=practice> (last visited August 12, 2006) (noting law firm's involvement in the case).

118. *Texaco in Ecuador*, http://www.texaco.com/sitelets/ecuador/en/legal_archives/arbitration.asp (last visited October 18, 2006). Admittedly, Texaco is not posting its filings in the arbitration in the same manner that it is posting its court filings, and it is doubtful that Texaco would willingly disclose those documents based on informal requests.

119. Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1201 (1999) (arguing that the Securities and Exchange Commission has the power to require social disclosure by publicly listed companies to promote social transparency); see also Cyrus Mehri et al., *One Nation, Indivisible: The Use of Diversity Report Cards to Promote Transparency, Accountability and Workplace Fairness*, 9 FORDHAM J. CORP. & FIN. L. 396 (2004).

120. See Lucien J. Dhooge, *Beyond Voluntarism: Social Disclosure and France's Nouvelles Régulations Économiques*, 21 ARIZ. J. INT'L & COMP. L. 441, 443 (2004) (reporting on recent legislative developments in France that require "all French corporations listed on the *premier marché* (and thereby possessing the largest market capitalizations) to annually report on the social and environmental impact of their activities commencing with their 2003 annual reports").

121. Rachel Cherington, *Securities Laws and Corporate Social Responsibility*, U. PA. J. INT'L ECON. L. 1439 (2004).

122. See *supra* notes 67–68, and accompanying text.

arbitrations becoming public. It is important to note, however, that not all judicial proceedings provide the same level of disclosure because not all countries require that arbitral awards be rendered with reasons to be enforceable.¹²³ Those countries that condition enforcement on disclosure of the reasons for an award presumably do so not to promote transparency in the international arbitration system, but to promote the transparency and legitimacy of their own judicial processes.¹²⁴

In addition to judicial proceedings in support of arbitration, disclosures may also come about through judicial proceedings that are ancillary to arbitration cases. For example, the victims who brought claims in national courts against ChevronTexaco may want to obtain information or testimony provided in the arbitration for use in their lawsuit. National authorities can require such disclosure. While States generally require disclosure of such information when the request is on behalf of regulatory authorities, they are less uniform when the information is requested by private litigation. Some countries, such as England, treat awards and documents created in the course of an international arbitration as confidential and generally do not permit them to be used in subsequent litigation.¹²⁵ There are some exceptions, for example, if the information sought is required for the fair disposal of a subsequent case or if disclosure of the award is sought in the interest of one of the parties to the arbitration. Moreover, the protections are lower for information that is simply disclosed in an arbitration (as opposed to

123. See James T. Peter, *Med-Arb in International Arbitration*, 8 AM. REV. INT'L ARB. 83, 86, n.21 (1997) (noting that some civil law systems treat unreasoned awards as unenforceable violations of public policy). Notably, even if reasons are not required, an enforcement proceeding necessarily leads to disclosure of the existence of the dispute and the final outcome. Additional details may also be revealed if the basis for challenge involves arguments that implicate the substance of the dispute, such as whether it was outside the scope of the arbitration agreement.

124. In the United States, for example, there is no requirement at the enforcement stage for a reasoned award, but if the parties seek interim relief or assistance with discovery, they are required to reveal substantive details about the case. See e.g., INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION U.S. A-35, Annex I (Pieter Sanders & Albert Jan van den Berg eds., 2000 & 2001 Supp.) (noting that courts will "independently determine if the requested discovery [against a third party] is relevant" but generally defer to arbitrators' rulings regarding discovery among parties).

This apparent anomaly suggests that when the court is charged with making a substantive evaluation about whether interim relief or discovery is warranted, it needs information to make its determination and its own decisional processes must be transparent. When its inquiry is limited to an ostensibly nonsubstantive review of the award, however, there is no similar need for transparency because the court is performing an arguably more perfunctory task. Meanwhile, in civil law countries, which maintain a tighter grip on topics that are not arbitrable or whose resolution are still subject to substantive evaluation, the requirement of a reasoned award can be regarded as a necessary predicate for the court to be transparent in its evaluation.

125. See Gordon Smith & Meef Moh, *Confidentiality of Arbitrations—Singapore's Position Following the Recent Case of Myanma Yang Chi Oo Co. v. Win Win Nu*, 8 VINDOBONA J. INT'L COMM. L. & ARB. 37, 43–47 (2004) (summarizing English judicial precedents on this issue).

being generated in an arbitration).¹²⁶ Even with these exceptions, English limitations on disclosure are more deferential to arbitration parties than those of other countries, such as the United States, Sweden, Australia,¹²⁷ and Singapore.¹²⁸

While lacking the benefits of uniformity, disclosure standards developed at the national level are based on national assessments of the interests of local constituencies and judicial procedures. Unlike the international reforms contemplated by transparency proponents, the benefit of nationally promulgated disclosure obligations is that groups interested in such information enjoy more political strength at the national level. In crafting the content of and enforcing disclosure obligations, political and regulatory authorities are more likely to be responsive to these constituencies and can strike a more careful balance between their interest in disclosure and the arbitrating parties' interests in maintaining confidentiality.

2. Regulatory Interests in International Commercial Arbitration

While the issues targeted by proponents of transparency reforms involve monitoring the conduct of the parties, not the conduct of arbitrators, certain national regulatory interests may imply a need to monitor arbitrators. One such category is bribery,¹²⁹ which outside the adjudication context has become almost synonymous with international transparency efforts. Unlike pollution or human rights abuses, which are separately verifiable and relatively public, bribery is a secret offense and a reoccurring problem in large international commercial contract settings.¹³⁰ Moreover, if international arbitration provides a means for

126. *Id.* at 43–44; Buys, *supra* note 2, at 130 n.37.

127. In a highly publicized and hotly debated opinion, the Australian high court concluded that there is no basis in contract to support an obligation to maintain as confidential matters from a commercial arbitration. *Esso Australia Resources v. Plowman*, 183 C.L.R. 10,30 (1995); *see also* Charles N. Brower & Abby Cohen Smutny, *Recent Decisions Involving Arbitral Proceedings*, 30 *Int'l Law* 271, 280–82 (1996) (summarizing *Esso*).

128. *See* Buys, *supra* note 2, at 129–30.

129. Other categories may include money laundering, tax evasion, or other white-collar crimes. These subjects are arguably less well developed within the international arbitration community, though their treatment seems postured to follow a course similar to that of bribery. *See, e.g.*, Andrew de Lotbinière McDougall, *International Arbitration and Money Laundering*, 20 *AM. U. INT'L L. REV.* 1021, 1039–40 (2005) (analogizing money laundering to bribery in analyzing whether arbitrators have jurisdiction and how they should treat it).

130. From 1994 to 2005, allegations of bribery have been raised in regarding 240 international contracts worth a total of \$108 billion. *See* Daniel Patrick Ashe, *The Lengthening Anti-Bribery Lasso of The United States: The Recent Extraterritorial Application of The U.S. Foreign Corrupt Practices Act*, 73 *FORDHAM L. REV.* 2897, 2907–08 n.71 (2005) (quoting Joseph F. Savage *et al.*, *New Amendments to the Foreign Corrupt Practices Act Broaden Its Scope as Enforcement Increases*, *WHITE-COLLAR CRIME REP.* July–Aug. 1999, at 5 n.10).

enforcing contracts to pay bribes or contracts procured through bribery, then the arbitration process itself, not only the underlying conduct, is implicated by anti-bribery efforts.

Instead of providing an example of why mandatory transparency reforms are necessary, the bribery issue instead illustrates the international arbitration system's potential to respond to issues of public importance and the utility of disclosure mechanisms. The international arbitration community has a strong, though not untarnished,¹³¹ record of fighting bribery. A general consensus has emerged that contracts for bribery or procured through bribery are unenforceable in arbitration. Arbitrators have wrangled with complex issues about jurisdiction, choice of law, and standards of proof to develop an established body of arbitral procedure for how to deal with cases where bribery is suspected.¹³² Even more impressively, within the arbitration community, there is already debate about whether arbitrators have, or should be deemed to have, a compulsory obligation to report incidents of bribery.¹³³ These developments demonstrate that in the context of bribery and corruption, arbitrator conduct is generally attentive to public interests. To ensure more reporting, states could promulgate disclosure obligations that legally require the types of disclosures currently contemplated within the arbitration community.

Another area in which there is a need to monitor the conduct of arbitrators, not only parties, is in monitoring how well arbitrators uphold the policy interests at stake in the applicable laws.¹³⁴ Private contract

131. See *Northrop Corp. v. Triad Int'l Mktg. S.A.*, 811 F.2d 1265, 1271 (9th Cir. 1987) (enforcing an arbitral award that held as enforceable a contract for "commission payments" that served as a mechanism for bribery).

132. A. Timothy Martin, *International Arbitration and Corruption: An Evolving Standard*, 1 TRANSNAT'L DISP. MGMT. (May 2004), available at <http://www.transnational-dispute-management.com/samples/freearticles/tv1-2-article45a.htm>.

133. See *id.* (concluding that "[t]here is probably an obligation and even a duty on an arbitral tribunal to inform the appointing authority and the administering institute of suspicions or proven allegations of corruption"). Also outside the arbitration context, disclosure programs are a potent tool in fighting bribery. The SEC implemented "a voluntary disclosure program in which over 400 companies self-reported 'questionable payments.'" Adriaen M. Morse, Jr., *Breaking the Circle: The Problem of Independent Directors Policing Public Company Financial Disclosure Under the SEC's New Rules Governing Public Company Audit Committees*, 23 ANN. REV. BANKING & FIN. L. 673, 680 (2004); see also F. Joseph Warin & Jason A. Monahan, *Recent Developments Under the Foreign Corrupt Practices Act: Lessons for Compliance and Disclosure*, 19 NO. 6 INSIGHTS 9, 9 (2005) (describing how the number of voluntary disclosures of FCPA violations have "increased dramatically").

134. See Philip J. McConaughay, *The Risks and Virtues of Lawlessness: A 'Second Look' at International Commercial Arbitration*, 93 NW. U. L. REV. 453, 461 (1999). Two important bases for McConaughay's objections are international arbitration's "secrecy" and "procedural irregularity." *Id.* at 454.

law, when comprehended as a whole, has a regulatory function,¹³⁵ which can be undermined if national law is obviated through international arbitration. Meanwhile, many areas of economic life are expressly and directly subject to mandatory national regulation, which can be systematically avoided because there is scant substantive oversight of arbitrators' application of mandatory national laws, such as antitrust and securities laws.¹³⁶ This risk of evasion is generally stated as a universal risk, but it may be disproportionately borne by countries such as the United States, where courts have adopted a posture of extreme deference to international arbitration. European legislatures and courts have been somewhat more reluctant to relinquish oversight of these matters, even if they have taken great strides in recent years.¹³⁷ One particularly interesting example is the requirement, imposed by the European Court of Justice, that national courts review arbitral awards to ensure that European competition law is properly applied by arbitrators.¹³⁸ Presumably, awards that do not apply European Union antitrust law will not be enforced.

As Robert Wai has observed, international commercial arbitration "is a venue for the contact and mutual influence of different systems," as well as a context "to encourage contestation among and across other normative orders."¹³⁹ Since arbitrators seek to render enforceable awards, in light of these lopsided review standards imposed by U.S. and European courts, arbitrators may be more likely to apply European competition law in cases where either U.S. or European law may apply. Since the outcomes of arbitral proceedings are not systematically available, it would be difficult, if not impossible, for regulators to gauge the extent to which United States' (or other nations') laws and policies are "losing out" to other foreign national laws.

To date, the United States has not shown any interest in investigating the nature and extent of this problem. When the problem is finally addressed, however, once again, disclosure obligations would be the most effective and direct resource. First, U.S. courts could insist, as

135. As Robert Wai explains, "Even if merchant parties rarely litigate, they are aware of and act in accordance with background private law as well as merchant norms." Robert Wai, *Transnational Private Law and Private Ordering in a Contested Global Society*, 46 HARV. INT'L L.J. 471, 477 (2005).

136. McConaughay, *supra* note 134, at 474-76.

137. Thomas E. Carbonneau & François Janson, *Cartesian Logic and Frontier Politics: French and American Concepts of Arbitrability*, 2 TUL. J. INT'L & COMP. L. 193, 194 (1994) (arguing that "the dilution of [restrictions limiting] arbitrability in United States law is also occurring in France and other European civil law jurisdictions").

138. See Maud Piers, *How EU Law Affects Arbitration and the Treatment of Consumer Disputes: The Belgium Example*, 59-JAN DISP. RESOL. J. 76, 79 (2004).

139. Wai, *supra* note 135, at 483.

most European courts already do, on written awards that would allow them to assess more clearly the regulatory issues at stake in the case.¹⁴⁰ Interested states could also impose reporting requirements so that they can address these regulatory interests. For example, in *Mitsubishi v. Soler*,¹⁴¹ the ICC provided numerous examples of cases it had administered in which various national competition laws were handled adeptly.¹⁴² Notably, all the cases cited by the ICC had been published previously, such that no new information was produced, but formal compilation of such information could be required by regulatory authorities interested in monitoring how international arbitration is managing such claims.

B. Prospects for Future Transparency Reforms

Even if I advocate national substantive disclosure obligations as an alternative to mandated transparency reforms at the international level, I also remain convinced of the benefits of voluntarily increasing transparency within the system and confident that international arbitration will continue in its trajectory toward greater transparency.

The international commercial arbitration community is normatively committed to ensuring the legitimacy of the system and it has a very practical concern in retaining support from national legal systems.¹⁴³ This orientation is largely responsible for its legitimacy and its strides toward transparency in recent years. While it remains to be seen whether the new transparency advocates are the first signs of a new wave of skepticism to come, other sources will pressure the system to become more transparent.

Investor-state arbitration may create pressure or at least inspiration for greater transparency. Even if the two systems are distinct in many ways, the membrane between the two systems is rather permeable. Many of the lawyers and arbitrators who staff investment arbitration

140. In practice, the party resisting an award could raise an argument antitrust or other regulatory issues had been raised and were not adequately considered by the tribunal. Even though party arguments signal the invocation of regulatory issues, it is impossible without a developed and disclosed record, or a formal articulation of the arbitrators' reasoning, to assess how those issues were ultimately disposed of.

141. Amicus Curie Brief of International Chamber of Commerce, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (Nos. 83-1569, 83-1733).

142. *Id.* at 4-5.

143. In commenting on these developments, noted arbitrator John Beechy argues that they "suggest that governments, arbitral institutions and arbitration practitioners alike recognize that if arbitration is to continue to be the preferred means of resolving international disputes, potential users must be convinced that it remains relevant to the needs of international commerce." Beechy, *supra* note 108, at 33.

established themselves in international commercial arbitration and continue to shuttle back and forth between the systems. Precedents and procedures from the investment context also migrate into the international commercial arbitration. Given the vigor of pressures for increased transparency in investment arbitration,¹⁴⁴ it seems doubtful that they will stop at the blurred boundary between the two systems.

Pressure for reform will also continue to be exerted by the system's newcomers. There is a significant debate within the arbitration community of the extent to which there is a systematic bias against newcomers, with some claiming that it remains "a huge task" to convince developing nations that they can expect a fair hearing before international arbitration tribunals.¹⁴⁵ Others point out that most developing nations have access to and in fact retain top "insider" counsel. Regardless of where the actual truth lies, increased transparency is the cure for genuine inequities, perceived inequities or inaccurate claims of inequity.

The international arbitration community is deeply concerned with its real and perceived legitimacy. As Thomas Hale and Anne-Marie Slaughter explain, the internal values of an institution can make it more sensitive and responsive to external concerns about a lack of transparency.¹⁴⁶

In addition to legitimacy, greater transparency would bring many practical advantages to the system. Opacity creates inefficiencies, imprecision and potential inequities in the international commercial arbitration system. Without more systematic access to the full body of arbitral precedents, parties must spend resources tracking down precedents or reacting to untimely discovery of precedents.¹⁴⁷ Challenges to arbitrators or experts based on their conduct in previous cases is more difficult, and parties are left "on the sidelines and heavily dependent on their lawyers."¹⁴⁸ Transparency reforms have already gone

144. See *supra* notes 89–91 and accompanying text.

145. See Beechey, *supra* note 108, at 32; see also Ahmed Sadek El-Kosheri, *Is There a Growing International Arbitration Culture in the Arab-Islamic Juridical Culture?*, in INTERNATIONAL DISPUTE RESOLUTION: TOWARDS AN INTERNATIONAL ARBITRATION CULTURE 47–48 (1998) (noting that, despite the long history and current popularity of arbitration in Arab nations, the Arab legal community remains hostile toward transnational arbitration because of biased treatment by Western arbitrators).

146. Thomas Hale & Anne-Marie Slaughter, *Transparency: Possibilities and Limitations*, 30-WTR FLETCHER F. WORLD AFF. 153, 161 (2006)

147. See Nikki Tait, *When an Investment Becomes an Argument*, FIN. TIMES, Feb. 15, 2006, at A12 (noting inefficiency exemplified by a City of London lawyer who discovered during oral argument that "one of the key points" he was arguing "had been the subject of a recent but unpublished decision in another dispute involving different parties").

148. See *id.*

a long way to resolving these problems and the need for still further progress has caught the attention of many leading arbitrator insiders.¹⁴⁹ Increased clarity and precision is also being pressed in specific procedural contexts, such as the rendering of interim awards¹⁵⁰ and the assessment of costs.¹⁵¹ For all these reasons, in the words of Jan Paulsson, a leading arbitrator and scholar, “the windows and doors should be opened, and the roof should be taken off.”¹⁵²

V. CONCLUSION

Given historical presumptions about confidentiality and the lack of any public or governmental pressure, there is a surprisingly high level of transparency in international commercial arbitration today. Much of the impetus for that increased transparency has been the self-interest of the systems’ users, either in competitively promoting themselves within the system or in drawing new participants to the system. The byproducts of this self-interest have inured to the benefit of the public at large.

Newer, more radical proposed reforms to compel greater transparency have not fully considered the competitive dynamics that have worked to bring greater transparency. Reforms that do not grow naturally out of existing competitive and cooperative processes, but

149. For example, leading arbitrator Jan Paulsson argues that if an expert knows “that his or her written and spoken words are like so many ships that will sail out on the sea of international criticism, to be compared with previous utterances, the insincerity risk . . . diminishes.” Email from Jan Paulsson, February 4, 2006 (on file with author).

150. See generally William Want, *International Arbitration: The Need for Uniform Interim Measures of Relief*, 28 BROOK. J. INT’L L. 1059 (2003).

151. As John Gotanda has pointed out, increased transparency could lead to more predictable and equitable assessments of costs. He builds on Michael Bühler’s analysis:

For an arbitrator, there is little guidance in the ICC rules to assist [him or her] in reaching a decision on costs. The lack of a precise rule in this respect has meant the absence of a system of precedents or explanations in awards, which would be necessary to justify the manner in which such a rule might be applied. Consequently, the arbitrator is potentially open to an indeterminate number of rules and factors from outside the ICC system, which [he or she] may apply at [his or her] will. As matters stand, it is not surprising that perhaps the most disappointing features of the ICC cost system are the failure of arbitrators to rationalize the exercise of their discretion in making the apportionment of costs and that allocations vary enormously without apparent justification from one arbitration to another.

John Yukio Gotanda, *Awarding Costs and Attorneys’ Fees in International Commercial Arbitrations*, 21 MICH. J. INT’L L. 1, 20, n.91 (1999) (quoting Michael Bühler, *Costs in ICC Arbitration: A Practitioner’s View*, 3 AM. REV. 116, 151–52 (1992)).

152. Email from Jan Paulsson (Feb. 5, 2006) (on file with author). As he describes, Paulsson’s conclusions are in part developed from his experience on the Court of Arbitration for Sport, where participants can decry the outcomes as the product of “political intrigue” through “amazingly distorted versions of what happened” and without the possibility of being challenged. See *id.* Notably, Paulsson’s pro-transparency stance stops short of forcibly imposing such a requirement on unwilling parties.

instead are coerced externally, may be resisted by precisely those actors necessary to make them work. If arbitral institutions impose (or are forced to impose) rules mandating transparency, parties unwilling to submit to such requirements may choose other institutions or migrate out of institutional arbitration altogether.

Ultimately, the international arbitration community's voluntary movement toward greater transparency was made by parties who have collectively decided that they need predictable, rule-based adjudication of their disputes. Having opted for a system that aims to bring a Rule of Law to international commercial disputes, parties and those providing legal services cannot pull the curtains around the system and turn out the lights.¹⁵³ Transparency is an inherent feature of the Rule of Law.¹⁵⁴ If international commercial arbitration's users want the benefits of a rule-based system, they cannot reject the transparency that comes with it.

153. Like transparency, "Rule of Law" is a term that is often misunderstood and ill-defined. This Article refers to "Rule of Law" as a simplified, ideal type that envisions clear and determinative rules, as opposed to opaque and subjective standards, that ensure decisions are "ruled" by "law." See generally Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1 (1997) (identifying four ideal types of the Rule of Law, none of which captures the nuance and complexity of the concept, but each of which are invoked by various constituencies in arguing for particular constitutional approaches or outcomes). In addition, this Article elaborates on international arbitration's transition from a dispute resolution system to a system of justice. See also Catherine A. Rogers, *The Vocation of International Arbitrators*, 20 AM. U. INT'L L. REV. 957, 970-75 (2005) (discussing the imperfect regulation of the imperfect market).

154. This is Lon Fuller's essential point that the Rule of Law requires publicly accessible rules that are known in advance. See Fallon, *supra* note 153, at 2 (citing LON L. FULLER, *THE MORALITY OF LAW* 42, 44 (rev. ed. 1964)).
